

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 23, 2007 Session

CHRISTOPHER A. DAVIS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 96-B-867 J. Randall Wyatt, Judge

No. M2005-02146-CCA-R3-PC - Filed April 19, 2007

The Petitioner, Christopher A. Davis, was convicted by a Davidson County jury of attempted second degree murder for the shooting of Mr. James Frierson.¹ The trial court sentenced the Petitioner to ten years in the Department of Correction. This Court affirmed the Petitioner's conviction on direct appeal. The Petitioner then filed a petition for post-conviction relief, which was denied. The Petitioner now asserts that the post-conviction court erred in denying his petition. Specifically, he alleges (1) that he received the ineffective assistance of counsel because his trial counsel did not file a motion to suppress evidence of a gun box; (2) that counsel was ineffective for not objecting to the mentioning of and introduction of the gun box as evidence; and (3) that his conviction was in violation of procedural due process protections because he was a juvenile when the crime was committed and was "unconstitutionally subjected to prosecution as an adult." Finding no error, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Paul J. Bruno, Nashville, Tennessee, for the appellant, Christopher A. Davis, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Tom Thurman, Assistant District Attorney General, for the appellee, State of Tennessee.

¹ This appeal relates only to the attempted second degree murder of Mr. James Frierson on February 27, 1996—Case Number 96-B-867. Initially, we note that the Petitioner has been involved in two other cases which are referenced in the record of this case. To avoid confusion, we will briefly mention these cases, although they are not before this Court in this appeal. Case Number 96-B-866 is a double homicide which also occurred on February 27, 1996, the same evening as the Frierson shooting. Although the crimes in these cases occurred on the same evening, they were apparently unrelated. Case Number 98-D-2728 involved the shooting of Adrienne Dickerson on October 17, 1995. Evidence obtained from the search of the Herman Street residence on February 28, 1996, was involved in the prosecution of all three cases.

OPINION

The Petitioner was convicted by a Davidson County jury of attempted second degree murder in the shooting of Mr. James Frierson. The factual background of the offense was summarized by this Court on direct appeal:

At trial, the victim, James Frierson, testified that on February 27, 1996, he went to Henry Short's house to drink beer and use cocaine in celebration of being drug-free for ninety days. The victim and Short called a man known as "Yo-Yo" and asked him to come to the apartment to sell them cocaine. The victim testified he bought twenty-five dollars (\$25) worth of cocaine, conspicuously paying "Yo-Yo" from a large roll of money he had in his front pocket.

Approximately forty-five minutes later, according to the victim, the [Petitioner] knocked on the door of Short's apartment. The victim knew the [Petitioner] and knew that the [Petitioner] was friends with "Yo-Yo." The [Petitioner] asked the victim to come outside with him. The victim followed the [Petitioner] to the parking lot, where a car driven by Yakou Murphy, whom the victim did not know, was waiting. The [Petitioner] climbed into the car behind the driver, and the victim sat in the front passenger's seat. Immediately, the victim noticed a .38 caliber gun in Murphy's lap, thought the [Petitioner] was also armed with a gun, and began to suspect he was in danger of being robbed. According to the victim, the [Petitioner] suggested they rent a hotel room in which to party and asked the victim if he had any identification. The victim, trying to "talk [his] way out of it," told the [Petitioner] and Murphy he would go with them after he retrieved his phone from inside Short's apartment. The victim testified that once he exited the car, he told the [Petitioner] and Murphy that he had changed his mind and began to walk away from them. Murphy then exited the car and called to the victim. When the victim turned to see what Murphy wanted, Murphy came at him with a gun, shooting at him twice as he tried to run away. The second shot Murphy fired hit the victim in the back.

The victim ran to Short's apartment, and Short drove him to the hospital, where he gave a description of the [Petitioner] and Murphy to the police. He also told the police that he knew the [Petitioner]. The victim testified that he initially lied to the police and at the preliminary hearing about what happened, saying that he was the victim of an attempted carjacking. He testified that he lied because he was afraid the police would not pursue his case if they thought he had been involved in a drug deal.

Murphy also testified at trial. He acknowledged that he was charged with first-degree murder, especially aggravated robbery, and criminal attempt to commit first-degree murder and was facing the possibility of life imprisonment or life imprisonment without parole. He stated that he agreed to testify in this case and two other trials in the hopes of gaining favorable consideration on the amount of prison time he would be required to serve. Murphy testified that he was at the [Petitioner's] apartment on the evening of February 27, 1996, when the [Petitioner] retrieved a .38 caliber pistol from his bedroom, gave it to Murphy, and asked him to accompany him to an undisclosed location. According to Murphy, the [Petitioner] himself was armed with a .45 caliber automatic pistol. Murphy testified that they left the [Petitioner's] apartment in a car. By following the directions the [Petitioner] gave him, Murphy drove to the parking lot outside of Short's apartment. Once there, the [Petitioner] went inside one of the apartments, returning shortly thereafter with the victim, whom Murphy did not know. Murphy testified that they sat in the car—the [Petitioner] in the back seat behind him and the victim in the front passenger seat—and discussed getting a hotel room. According to Murphy, when the victim then left the car and began to walk away, the [Petitioner] told Murphy that the victim had “some money” he needed and ordered Murphy to exit the car and “get him.” Murphy testified he called to the victim, who stopped momentarily, but began running when he realized that Murphy was pointing a gun at him. According to Murphy, the [Petitioner] then ordered him to shoot the victim. Murphy testified he fired two shots at the victim, but when they realized the victim had escaped, they fled.

Murphy also testified that a man known as “Yo-Yo” was “a regular” at the [Petitioner's] apartment and that the [Petitioner's] purpose in visiting the victim that evening was to rob him. Moreover, Murphy testified that after the shooting, the [Petitioner] instructed him that if he were arrested, he should tell the police that he shot the victim because the victim had attempted to steal drugs from him. When Murphy was arrested, this was the story he initially told police.

Detective Alfred Gray of the Metropolitan Police Department testified that on the morning of February 28, 1996, he visited the [Petitioner's] apartment. According to Detective Gray, as he was talking with the [Petitioner's] roommate, the [Petitioner], who was armed, entered the apartment with three individuals, including the man known as “Yo-Yo.” Detective Gray testified that they ran back

out the door, and while doing so, the [Petitioner] reached for his weapon, which was a .45 [caliber] automatic pistol.

A subsequent search of the [Petitioner's] apartment disclosed an empty .38 caliber box in the closet of the [Petitioner's] bedroom; the .38 caliber pistol was not recovered from the [Petitioner's] apartment. The bullet taken from the victim's body was a ".38, .357 caliber lead bullet," which could have been fired from either a .38 caliber pistol or a .357 caliber pistol. After the victim was released from the hospital, he identified the [Petitioner] and Murphy in separate photographic line-ups.

State v. Christopher A. Davis, No. 01C01-9710-CR-00506, 1999 WL 61598, at *1-2 (Tenn. Crim. App., Nashville, Feb. 9, 1999), perm. to appeal denied, (Tenn. July 12, 1999).

The Petitioner filed a timely petition for post-conviction relief, which was later amended by counsel. The post-conviction court conducted a single hearing to dispose of both the petition in this case—Case Number 96-B-867—and the petition in another homicide case involving the Petitioner—Case Number 98-D-2728.² At the hearing, the Petitioner presented three witnesses, including himself, in support of his petition relating to the Frierson shooting.

Detective Pat Postiglione testified that he was one of the arresting officers in the case of the attempted murder of Mr. James Frierson. Detectives Postiglione, Pridemore, and Gray were doing investigative work at a residence when the Petitioner arrived at the residence. The detective stated that, when the Petitioner entered the residence, the Petitioner was armed and that he fled the residence when he saw police officers were present. He stated that the Petitioner was chased, arrested, and denied living at the residence. After the Petitioner denied residing at the home, Detective Postiglione received consent from another resident, whom the detective believed was Mr.

² We agree with the State that the post-conviction court did err in consolidating the cases for the post-conviction hearing and have subsequently severed the cases on appeal.

Ronald Benedict, to search the Petitioner's room.³ In the Petitioner's closet,⁴ Detective Postiglione found a black canvas bag which contained an empty .38 caliber gun box.

The Petitioner's trial counsel testified that he did not file a motion to suppress the gun box, reasoning as follows:

The only thing I had a real interest in [suppressing] would have been . . . the [gun] box, but that box was . . . a Rossi brand pistol box. The [Tennessee Bureau of Investigation] expert's testimony was going to be and was that . . . he excluded the Rossi brand pistol as having fired the projectile . . . that had struck Mr. Frierson.

The Petitioner's trial counsel also stated that he did not file a motion to suppress the gun box because he had "a lot of doubt about even having standing" Finally, the Petitioner's trial counsel stated that he was concerned about any rulings in this case having an impact on the Petitioner's other cases, including a death penalty case which had yet to be tried. The Petitioner's counsel testified that, in a subsequent murder case against the Petitioner, he did file a motion to suppress the evidence obtained from this search.⁵ The trial court in that case denied the motion on

³ The Petitioner testified at the post-conviction hearing that the bedroom in which the gun box was found was the Petitioner's individual bedroom.

⁴ The order denying the motion to suppress in the double homicide case, Case Number 96-B-866, was introduced into evidence over the objection of the Petitioner at the post-conviction hearing. The post-conviction court allowed this order into evidence because it pertained to the same search of the Herman Street residence on February 28, 1996. The additional facts gleaned from this order regarding the consent to search are included as follows:

When the detectives arrived at the [Herman Street] residence, they met with the lessee of the residence, Ronald Benedict. . . . Detective Pridemore observed the butt of a long rifle in a nearby bedroom. Detective Pridemore then requested consent to search the room. Mr. Benedict was not willing to give consent at that time, however, on the basis that the [Petitioner] allegedly stayed in the room.

. . . .

[Eventually, the Petitioner returned to the Herman Street residence and was apprehended by Detectives Gray and Postiglione.] According to Detective Pridemore, the [Petitioner] denied staying in the bedroom and also denied any knowledge of any items that might be located in the room. Detective Gray confirmed the [Petitioner's] statement. Based on the [Petitioner's] response, Detective Pridemore returned to the residence and informed Mr. Benedict of the [Petitioner's] remarks. At that point, Mr. Benedict gave the detective consent to search the room .

. . .

⁵ The Petitioner's trial counsel testified at the post-conviction hearing that he filed this motion to suppress in the Adrienne Dickerson trial, Case Number 98-D-2728. However, the order denying the motion to suppress entered into evidence at the post-conviction hearing regarded the double homicide in Case Number 96-B-866. It is unclear whether another motion to suppress was ever filed in the Dickerson matter and, if so, it is not included in the record on appeal.

the basis that the Petitioner lacked standing to contest the search because, at the time the search was conducted, he denied living at the residence and his co-resident permitted the search.

The Petitioner testified at the post-conviction hearing that he did live at the Herman Street residence. The Petitioner stated that he resided with Mr. Ronald Benedict, Mr. Benedict's girlfriend, Maquanna, and the Petitioner's girlfriend, Dimitrius Martin. The Petitioner stated that he was "paying the bills" at the residence and that he "was paying for all of the food in the residence." He stated that he had his own "separate" bedroom in the residence and that, although he was asked to consent to the search of his room, he did not give consent to any of the officers.

Following a hearing, the post-conviction court denied the Petitioner's petition. With regard to the Petitioner's claims of ineffective assistance of counsel, the post-conviction court found as follows:

The Petitioner's first allegation of ineffective assistance of counsel is that his attorney . . . failed to file a motion to suppress any evidence related to the recovery of a gun box from the Petitioner's bedroom. The [c]ourt finds that [trial counsel] did not file a motion to suppress the gun box discovered in the Petitioner's bedroom closet because the gun box was a Rossi brand. The [c]ourt finds that [trial counsel] believed that this type of ammunition was incompatible with the weapon used in the crime. The [c]ourt finds that [trial counsel] waited to file the motion to suppress the gun box until the death penalty case, which was denied on the grounds of the Petitioner's lack of standing, and the effective consent of the leaseholder. The [c]ourt is of the opinion that [trial counsel's] decision to not file the motion to suppress the gun box in the Frierson case was a tactical decision, which the [c]ourt will not second guess. The [c]ourt is further of the opinion that the Petitioner has failed to show any prejudice, and this ground is therefore without merit.

The Petitioner's second allegation of ineffective assistance of counsel is that [trial counsel] failed to object during the trial to the mention and introduction into evidence of the gun box. The [c]ourt is of the opinion that [trial counsel's] decision not to object to the introduction of the gun box into evidence was a tactical decision. The [c]ourt is also of the opinion that the Petitioner has failed to show any prejudice as a result of [trial counsel's] decision.

. . . .

Based on the record and the evidence presented at the hearing, the [c]ourt is of the opinion that [trial counsel] represented the Petitioner in a competent and thorough manner. The [c]ourt is also of the opinion that [trial counsel] was diligent in preparing the case for trial and made sound and reasonable decisions throughout the course of the proceedings. The [c]ourt is of the opinion that [trial counsel] made sound strategic decisions based on his extensive experience with cases of this kind.

The [c]ourt does not find sufficient evidence to support the Petitioner's claims of ineffective assistance of counsel. Furthermore, the [c]ourt is not convinced that the outcome of the trial would have been different had [trial counsel's] representation been other than what was provided.

With regard to the Petitioner's claim that his conviction violated procedural due process because he was a juvenile when he committed the crime and was "unconstitutionally subjected to prosecution as an adult," this allegation was not contained in either the Petitioner's pro se petition for post-conviction relief or his amended petition and was not addressed by the post-conviction court.

Analysis

I. Standard of Review

To sustain a petition for post-conviction relief, the petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

II. Effective Assistance of Counsel

The Petitioner's first allegation is that he received the ineffective assistance of trial counsel. The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the petitioner's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. Deficient performance requires that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment." Strickland, 466 U.S. at 694. Actual prejudice requires that "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Petitioner bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The Petitioner’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A post-conviction court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the post-conviction court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

A. Motion to Suppress Gun Box

The Petitioner first alleges that his trial counsel was ineffective because he did not file a motion to suppress the gun box that was found in his bedroom at the Herman Street residence. The Petitioner argues that the officers had no right to conduct a search because he did not give consent to the search of his bedroom and because the officers did not have “both ‘probable cause plus exigent circumstances.’” See Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (per curiam). The State argues that the search was constitutionally proper because “the [Petitioner] disavowed any interest in the apartment [at the time of the search] and Ronald Benedict, the legal resident of the apartment, consented to the search.” We conclude that the post-conviction court did not err in finding that trial counsel provided constitutionally effective representation even though he did not file a motion to suppress the gun box.

Our first inquiry must be whether the post-conviction court erred in determining that trial counsel was not deficient. We initially conclude that the Petitioner’s counsel was not deficient because the Petitioner did not have proper standing to contest the search. The trial court in Case

Number 96-B-866 analyzed the Petitioner's standing relating to the search of the Herman Street residence on the morning of February 28, 1996:⁶

The law provides that the one who challenges the reasonableness of a search or seizure has the initial burden of establishing a legitimate expectation of privacy in the place or property searched. Rawlings v. Kentucky, 448 U.S. 98 . . . (1980); State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990). Several factors are pertinent to the standing inquiry:

- (1) property ownership;
- (2) whether the defendant has a possessory interest in the thing seized;
- (3) whether the defendant has a possessory interest in the place searched;
- (4) whether the defendant has a right to exclude others from that place;
- (5) whether the defendant has exhibited a subjective expectation that the place would remain free from governmental invasion;
- (6) whether the defendant took normal precautions to maintain his privacy;
- and
- (7) whether the defendant was legitimately on the premises.

Woods, *supra*, at 208, citing United States v. Haydel, 649 F.2d 1152, 1154-55 (5th Cir. 1981). Based on the factual record in this matter, the Court finds that the [Petitioner] has forfeited any right to challenge the validity of the search.

The trial court in Case Number 96-B-866 also stated that, “[t]hough the [Petitioner] now asserts that he did not deny having a possessory interest in the room, the [c]ourt does not accredit his testimony. Notwithstanding, the [Petitioner] presented little evidence to establish his interest in the Herman Street residence or bedroom.”

Because the Petitioner denied having an interest in the bedroom or the residence at the time of the search, the trial court in that case concluded as follows:

The [Petitioner] effectively abandoned or renounced any interest he may have had in the room and is now precluded from challenging the validity of the underlying search. *See State v. Wooden*, 658 S.W.2d 553 (Tenn. Crim. App. 1983); Kelley v. State, 566 S.W.2d 858 (Tenn. 1978); Daniels v. State, 550 S.W.2d 958 (Tenn. 1976); Miller v. State, 520 S.W.2d 729 (Tenn. 1975); Bowman v. State, 211 Tenn. 38, 362

⁶ We again note that, although these were different cases and the double homicide in Case Number 96-B-866 and the Frierson attempted murder in Case Number 96-B-867 were unrelated, both involved the same search of the Herman Street residence on February 28, 1996. The post-conviction court admitted this order denying the motion to suppress in Case Number 96-B-866 into evidence in the Frierson case.

S.W.2d 255 (Tenn. 1962). The law does not allow a defendant to disclaim an interest in property and then later to reassert that interest when it becomes convenient or beneficial.

We agree with the conclusions of the trial court in Case Number 96-B-866 regarding the validity of the motion to suppress evidence from the search of the Herman Street residence on the morning of February 28, 1996. Because the Petitioner did not have standing to contest the search, we agree with the post-conviction court's conclusion that trial counsel did not render deficient performance by failing to file a motion to suppress in the Frierson case at issue in this appeal.

Additionally, we conclude that the Petitioner's trial counsel was not deficient for failing to file a motion to suppress because Mr. Benedict consented to the search of the residence.⁷ "[A] search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of the carefully defined set of exceptions." Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971) (emphasis in original). The United States Supreme Court has held that consent is a valid exception to the warrant requirement. Schneekloth v. Bustamonte, 412 U.S. 218 (1973); see also State v. Bartram, 925 S.W.2d 227, 230 (Tenn. 1996). Consent is deemed valid if "the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). In the Petitioner's case, he explicitly denied living at the home. On the other hand, Mr. Benedict appeared to be a resident of the home, which the Petitioner claimed was true at his post-conviction hearing.⁸ Therefore, the officers reasonably believed that Mr. Benedict had the authority to consent to the search of the premises, as Rodriguez mandates. Thus, the Petitioner had no opportunity to succeed even had his attorney filed the motion to suppress evidence. We conclude that the Petitioner's trial counsel was not deficient because the search was based upon consent.

Finally, even if trial counsel were deemed to be deficient, the post-conviction court properly determined that "the Petitioner has failed to show any prejudice" as a result of trial counsel's decision not to file a motion to suppress. To determine whether the Petitioner could have suffered prejudice, we must analyze the potential impact of the introduction of the gun box in the Petitioner's trial. First, we have concluded that the motion to suppress would likely not have been successful even if filed and, therefore, the Petitioner faced little actual prejudice for this reason alone.

⁷ The trial court in Case Number 96-B-866 likewise dismissed the motion to suppress on the ground that Mr. Benedict consented to the search. The trial court found as follows:

In the present case, under the facts known to Detective Pridemore at the time he requested consent from Mr. Benedict, the [c]ourt is of the opinion that the detective acted with a reasonable, good-faith belief that the leaseholder had authority to effectuate consent to search the room. Based on the assertions of the [Petitioner], the detective had no reason to believe that Benedict did not have such authority.

⁸ The trial court in Case Number 96-B-866 found that Mr. Benedict was a lessee of the residence.

However, we additionally will consider the possible prejudice in the event that the motion to suppress should have been granted. To do so, we must first clarify the evidence surrounding the gun box.

The Rossi gun box was a container for a .38 caliber weapon. The evidence adduced at trial showed that the Petitioner gave Yakou Murphy a .38 caliber weapon just before the attack upon Mr. Frierson. Further, Mr. Frierson testified that he saw a .38 caliber weapon in Mr. Murphy's possession shortly before he was shot. The bullet eventually extracted from the victim was from either a .38 caliber or a .357 caliber weapon. However, despite this apparent connection, trial counsel testified at the post-conviction hearing that "[t]he [Tennessee Bureau of Investigation] expert's testimony was going to be and was that . . . he excluded the Rossi brand pistol as having fired the projectile . . . that had struck Mr. Frierson." Therefore, although the jury heard testimony that a .38 caliber weapon may have been used to shoot Mr. Frierson, the ultimate conclusion that a Rossi gun could not have been used minimized the impact of the introduction of this gun box. Thus, the Petitioner has failed to prove by clear and convincing evidence that, but for trial counsel's failure to file a motion to suppress the evidence of the gun box, there was a reasonable probability that the outcome of his trial would have been different.

B. Failure to Object to Evidence of the Gun Box

Next, the Petitioner alleges that his trial counsel was deficient in failing to object to testimony about and introduction of the gun box. The Petitioner argues that the "'gun box' which was introduced at trial was irrelevant to the case at hand as the 'gun box' was not related to the type of weapon used in the crime related to this case." The Petitioner further argues that, "[a]s such, the trial court would have sustained trial counsel's objection and the evidence regarding the gun box would not have been admitted." The State argues that trial counsel's tactical decision should not be "disturbed on collateral review."⁹

Again, we begin our inquiry with whether trial counsel's performance was constitutionally deficient. The post-conviction court found that trial counsel did not render deficient performance by failing to object to the introduction of the gun box. Specifically, the post-conviction court found that trial counsel's decision not to object to the reference to and the introduction of the gun box was a "tactical decision."

We agree with the post-conviction court that this strategic decision on the part of trial counsel must be afforded the "strong presumption" that the performance was reasonable. We observe that it may appear that this is the type of evidence that would merit an objection under Tennessee Rules

⁹ The State also argued that "the [Petitioner's] assertion that the gun box was irrelevant is contradicted by this Court's opinion on direct appeal." The State relied on the fact that the "co-defendant's testimony that the [Petitioner] provided the .38 caliber handgun used in the attempted murder was corroborated by the discovery of a .38 caliber box in the [Petitioner's] bedroom." Again, we note that this apparent relation between the .38 caliber gun box and the weapon used to shoot the victim was nullified by the Tennessee Bureau of Investigation agent's testimony that the gun from the Rossi gun box could not have been the weapon used to shoot Mr. Frierson. The State's reliance on the apparent match between the .38 caliber weapon used to shoot Mr. Frierson and the .38 caliber Rossi gun box is misplaced.

of Evidence 401 and 403. See Tenn. R. Evid. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); Tenn. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time . . .”). However, it is not the role of a reviewing court to “use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics.” See Hellard, 629 S.W.2d at 9.

Although trial counsel did not object to the introduction or mention of the Rossi Brand pistol gun box, it was definitively determined not to be the brand of weapon used to shoot Mr. Frierson, and trial counsel did insure that the jury was made aware that this brand of weapon could not have been used to shoot the victim. Therefore, trial counsel refuted the direct negative consequences of the introduction of the gun box. Therefore, we conclude that trial counsel’s performance was within the range reasonably expected of competent counsel.

Even if trial counsel were to be deemed deficient, the Petitioner has not shown that he suffered actual prejudice. The Petitioner did not demonstrate that the introduction of the .38 caliber gun box that was ruled out as being associated with the firearm that shot the victim hampered his trial. The Petitioner himself asserted that this evidence was highly irrelevant and merited exclusion because of its lack of connection to the proof at trial. The Petitioner cannot then assert that, on the contrary, the evidence was so damaging as to produce a “reasonable probability that the outcome of his trial would have been different” had the gun box not been introduced. Therefore, we conclude that the Petitioner failed to demonstrate any actual prejudice from the mention and introduction of the gun box.

III. Procedural Due Process

Finally, the Petitioner asserts that his right to procedural due process was violated because he was a juvenile at the time the crime was committed and was “unconstitutionally subjected to prosecution as an adult in this case.” Specifically, the Petitioner argues as follows:

[The Petitioner] was charged by indictment by the Davidson County Grand Jury without having been properly transferred to Criminal Court. In other words, [the Petitioner] was indicted by the Davidson County Grand Jury as a juvenile defendant. The Davidson County Grand Jury has jurisdiction to indict individuals who are properly before the Criminal Courts of Davidson County. Since [the Petitioner] was not prosecutable as an adult at the time he was indicted, he was unconstitutionally indicted by the Davidson County Grand Jury as a juvenile. The Davidson County Grand Jury did not have proper jurisdiction to indict [the Petitioner].

The Petitioner did not raise this issue in either his pro se petition for post-conviction relief or in his amended petition. As such, the post-conviction court made no findings of fact or conclusions of law on this issue. Our legislature has clearly provided that “[t]he jurisdiction of the

court of criminal appeals shall be appellate only” Tenn. Code Ann. § 16-5-108. “We are not authorized to conduct hearings and determine disputed issues of fact.” State v. Williams, 52 S.W.3d 109, 121 (Tenn. Crim. App. 2001) (citing Duncan v. Duncan, 672 S.W.2d 765, 767 (Tenn. 1984)). Because this claim was never brought before the post-conviction court, the issue of whether the Petitioner’s procedural due process rights were impinged upon is beyond the reach of our jurisdiction, and the issue has been waived.

Additionally, even if the Petitioner had raised this claim so as to properly bring the issue before this Court on appeal, the Petitioner has failed to include any citation to applicable legal principles which would support his argument. As Rule 10 of the Rules of the Court of Criminal Appeals of Tennessee states, “[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.” Tenn. Ct. Crim. App. R. 10(b); see also Tenn. R. App. P. 27. Because the Petitioner has not provided this Court with any citation to authorities regarding the issue of procedural due process, the issue would be waived even if it had been properly before the Court.

Conclusion

Based upon the foregoing reasoning and authorities, we conclude that the trial court did not err in finding that the Petitioner received the effective assistance of counsel and that the Petitioner’s claim regarding any procedural due process violation is not within our jurisdiction and is waived. Therefore, we affirm the judgment of the post-conviction court.

DAVID H. WELLES, JUDGE